

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34391

STATE OF IDAHO,)	2008 Unpublished Opinion No. 702
)	
Plaintiff-Respondent,)	Filed: November 7, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
DONALD BRINK,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Judgment of conviction for first degree murder with an enhancement for using a deadly weapon and being a persistent violator, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Donald Brink appeals from his judgment of conviction for first degree murder with an enhancement for using a deadly weapon as well as being a persistent violator. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Brink left his van, with personal property stored inside, at the home of an acquaintance. His van was broken into and some of his personal property was stolen. Soon thereafter, his van also disappeared. He inquired of the occupants of the home, and they indicated that Brent Lillevold had taken his van. In the ensuing days, Brink issued profanity-laced threats of death or serious injury against Lillevold on several occasions. Brink was seen sawing off the barrel of a shotgun and working with the stock and trigger assembly. He later hid a sawed-off shotgun behind the washing machine at the home where his van was stolen. Brink became obsessed with getting his van back and stated to several people his intention to exact revenge on Lillevold.

On May 29, 2005, Brink drove to the acquaintance's home where his van was stolen. He heard the voices of Lillevold's girlfriend and another acquaintance in a room and reasoned that Lillevold was also present. He retrieved the shotgun from behind the washer and entered the room. Brink threatened Lillevold and demanded that Lillevold retrieve his van. When Brink later demanded to be taken to his van, an argument ensued between Brink, Lillevold, and Lillevold's girlfriend regarding gas money. Lillevold's girlfriend rummaged through her purse and appeared to try to give the purse to Lillevold. Brink fired the shotgun and the round struck Lillevold in the chest, killing him almost instantly. Brink was charged with first degree murder with an enhancement for using a deadly weapon, I.C. §§ 18-4001 to -03, 19-2520, and being a persistent violator, I.C. § 19-2514.

Prior to trial, despite being represented by court-appointed counsel, Brink filed a number of pro se motions. These included a motion to correct pre-trial constitutional deprivations, two motions to disqualify counsel for cause, a motion for appointment of qualified counsel outside of the public defender's office, and a motion for mandatory and prohibitory injunctive relief and show cause hearing. Brink also sent several ex parte letters to the district judge and court clerk regarding his motions and also complaining about his conditions of confinement. The district court held hearings on Brink's motions regarding counsel, which Brink later withdrew. The district court declined to rule on the other pro se motions, reasoning that Brink's complaints regarding, among other things, conditions of confinement, limitations of his freedom at the jail, constitutional deprivations and limited access to legal materials, were civil matters which would be properly addressed through an application for a writ of habeas corpus. The district court additionally instructed Brink that, in order to avoid confusion, it would not consider any additional pro se motions so long as he was represented by counsel. Brink, through his counsel, filed a motion to exclude from evidence videotape and photographs of the crime scene that depicted the body of the victim, as well as photographs taken at the autopsy. The district court denied Brink's motion, concluding that the videotape and photographs were relevant evidence and that their probative value was not substantially outweighed by unfair prejudice.

A jury found Brink guilty of first degree murder with an enhancement for using a deadly weapon as well as being a persistent violator. Brink filed a motion for a new trial, which the district court denied after a hearing. The district court sentenced Brink to a unified term of life imprisonment plus thirty years, with a minimum period of confinement of thirty years. Brink

appeals, challenging the district court's denial of his motion to suppress the videotape and photographs depicting the victim's body. Additionally, Brink argues that the playing during opening statements of the videotape, which was not later admitted into evidence, violated his Sixth Amendment right of confrontation and that the prosecutor committed misconduct in using the videotape and photographs in his opening statement and closing argument and during the course of trial. Brink also argues that his constitutional rights were violated when the district court refused to accept additional pro se filings while he was represented by counsel and when it failed to dismiss the criminal complaint against him as a remedy for his alleged constitutional deprivations in the conditions of his confinement.

II. ANALYSIS

A. Motion to Suppress

Brink argues that the district court never affirmatively ruled on the relevance of the videotape and photographs of the crime scene, which included the victim's body, and only ruled as to the I.R.E. 403 balancing of probative value and prejudice.¹ He argues that the videotape and photographs are irrelevant² since it was undisputed that the victim was killed by a shotgun wound inflicted by Brink and, therefore, asserts that the evidence only had the effect of shocking the jury. Furthermore, Brink argues that, even if the videotape and photographs were relevant, the district court erred in ruling that their probative value was not substantially outweighed by their prejudicial effect.

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*,

¹ Idaho Rule of Evidence 403 provides that, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

² Idaho Rule of Evidence 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

Whether evidence is relevant under I.R.E. 401 is an issue of law over which we exercise de novo review. *State v. Raudebaugh*, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993); *State v. Perry*, 144 Idaho 665, 667, 168 P.3d 49, 51 (Ct. App. 2007). A lower court's determination under I.R.E. 403 will not be disturbed on appeal unless it is shown to be an abuse of discretion. *State v. Enno*, 119 Idaho 392, 406, 807 P.2d 610, 624 (1991); *State v. Clark*, 115 Idaho 1056, 1059, 772 P.2d 263, 266 (Ct. App. 1989). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

The disputed videotape contains footage of a detective descending down a staircase into the basement of the home where the murder occurred. The camera follows the detective through the hallway and cluttered rooms of the house. The camera then enters the room where the shooting occurred and focuses on blood stains on the carpet and spots of blood on the walls. The victim's body can be seen numerous times in the background. In a couple of instances, the camera focuses on the victim's body and the blood-stained couch cushion on which it lies. At one point, the camera zooms in on the victim's face which is splattered with blood. Several shots include measuring tape along the floor and walls.

The photographs at issue all depict the victim's body. One shows the body slumped on the couch in a blood-soaked shirt and pants, with blood splatters on his face. Two photographs are from the autopsy and show the victim's bare torso, after it was cleaned, with the three-inch gunshot wound to his chest. The photographs are the same except one is a close-up of the wound. A fourth picture shows the floor of the crime scene with measuring tape spread across in two directions. The victim's body is visible on the couch in the background. The fifth picture primarily depicts the couch cushion next to the victim's body with pools of blood on top of it. The victim's arm and a part of his blood-soaked shirt are also visible.

Brink argues that this evidence is irrelevant because it doesn't make any disputed fact more or less probable and that the probative value is substantially outweighed by the prejudicial

effect. First, we must determine the relevancy of the videotape and photographs. The general rule is that such evidence, duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question, is admissible at the discretion of the trial court for proper purposes. *State v. Martinez*, 92 Idaho 183, 188, 439 P.2d 691, 696 (1968). Such evidence is properly admitted as an aid to the jury in arriving at a fair understanding of the evidence, proof of the corpus delicti, extent of injury, condition and identification of the body, or for their bearing on the question of the degree of the crime, even though it may have the additional effect of tending to excite the emotions of the jury. *Id.*³ In addition to these considerations, depictions of the body of a homicide victim have been admitted to refute a defendant's claim of self-defense. 40A AM. JUR. 2D *Homicide* § 421. "[P]hotographs of the body of a homicide victim are not necessarily inadmissible because . . . the defendant has admitted some or all of the facts shown thereby. Nor is there ground for exclusion, merely because the photographs offered are enlargements of original photographs." *Id.* (footnotes omitted).

At trial, Brink relied on self-defense and justifiable homicide as the foundation of his defense. Thus, in addition to proving corpus delicti of the crime, the evidence is relevant if it had any tendency to prove or disprove Brink's state of mind regarding his need to defend himself. Trial counsel for Brink and the state spent considerable time presenting evidence at trial regarding whether the victim was coming at Brink at the time the shot was fired. Blood splattering, bleeding patterns, the position of the body with floor measurements for perspective, and the size of the wound were all relevant considerations in this determination. Therefore, the videotape and photographs were relevant evidence.

Brink also alleges error because the district court did not make an affirmative finding of relevance before weighing the probative value and prejudicial effect. The district court's memorandum decision on pre-trial motions addressed the relevancy and prejudicial effect of this evidence. The title of the pertinent section reads: "The Photographs and Videotapes of the Crime Scene are Relevant and Admissible." The district court then addressed the arguments of

³ The *Martinez* opinion also states that photographs of a murder victim may be relevant to show the "atrociousness" of the crime. *Martinez*, 92 Idaho at 188, 439 P.2d at 696. Except in the sentencing phase of a murder case where the jury is asked to determine death penalty eligibility, which was not the case here, we see little or no circumstance where the "atrociousness" of a crime would be relevant or a permissible justification for the admission of a photograph.

Brink and the state regarding the relevance of the evidence and focused its analysis on the balancing of the prejudicial effect and probative value. The district court did not err by failing to make a more in-depth analysis of relevance prior to making its finding on whether the prejudicial effect substantially outweighed the probative value.

Next, we must consider whether the district court abused its discretion in finding that the prejudicial effect of the evidence did not substantially outweigh its probative value. The Idaho Supreme Court has held that a jury is entitled to have a full and complete description of the events surrounding the commission of a crime. See *State v. Windsor*, 110 Idaho 410, 416, 716 P.2d 1182, 1188 (1985). In this case, Brink contends that the videotape and photographs so inflamed the passions of the jury that their display tainted his entire trial. However, it should be presumed that a person capable of serving as a juror in a murder case can, without losing his or her head, bear the sight of a photograph showing the body of the decedent in the condition or place in which found. *Martinez*, 92 Idaho at 188, 439 P.2d at 696. As a court in another state has noted, “[g]ruesome photographs are a result of gruesome crimes.” *Brown v. State*, 989 P.2d 913, 934 (Okla. Crim. App. 1998). In the present case, the district court recognized the bases of proof served by the admission of photographs of the victim in a homicide case. It then held that “the fact that the photographs . . . may tend to excite the emotions of the jury is not a basis for excluding them.” The district court properly recognized its discretion and acted within its bounds through an exercise of reason. Therefore, the denial of Brink’s motion to suppress the videotape and photographs was not error.

B. Videotape Used in Opening Statement

Brink argues, for the first time on appeal, that the jury’s exposure to the videotape in the state’s opening statement, which was not later admitted into evidence, violated his Sixth Amendment rights. He bases his argument on *Eslaminia v. White*, 136 F.3d 1234 (9th Cir. 1998). That court held that “jury exposure to facts not in evidence deprives a defendant of the rights to confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment.” *Id.* at 1237. Brink alleges that this error tainted the entire trial.

No objection was made at trial regarding the violation of Brink’s Sixth Amendment right of confrontation as a result of the playing of the videotape during opening statement. This Court will not address an issue not preserved for appeal by an objection in the trial court. *State v. Rozajewski*, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct. App. 1997). However, we may

consider fundamental error in a criminal case, even though no objection was made at trial. *Id.* Fundamental error has been defined as error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived. *State v. Babb*, 125 Idaho 934, 940, 877 P.2d 905, 911 (1994).

In this case, the videotape was played at the beginning of the state's opening statement. As noted above, counsel for Brink made no contemporaneous objection to presenting the videotape before it had been admitted into evidence, nor did counsel make any subsequent objection requesting that it be stricken when the state later failed to offer the videotape into evidence. Counsel for Brink also did not raise this issue, or any issue regarding the videotape, in his motion for a new trial. In *Eslaminia*, the jury heard a tape-recorded interview during its deliberations that was not admitted into evidence. The recording was on the reverse side of an audiotape that was admitted into evidence and dealt directly with a central credibility determination. In *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), the case which *Eslaminia* cited for the proposition that jury exposure to facts not in evidence deprives defendants of constitutional protections, the court discovered that a sheriff's deputy responsible for ushering the jury had spoken to two jurors, outside of the courtroom, regarding the defendant's prior criminal history. The court reasoned that the defendant, therefore, "effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to the extraneous information." *Id.* at 406.

In this case, because the videotape was not admitted into evidence, the jury could not view it during deliberations, only during the opening statement. The district court had already overruled Brink's pretrial objection to the videotape and, hence, determined that it would be admissible if proffered. It was played in the courtroom in the presence of counsel and without any objection. *Eslaminia* and *Dickson* are clearly distinguishable. Brink's contention that his rights of confrontation and cross-examination were violated is without merit and does not rise to the level of fundamental error.

C. Prosecutorial Misconduct

Brink next alleges prosecutorial misconduct in the displaying of the videotape during the prosecution's opening statement and the use of the photographs depicting the victim's body through the course of the trial, including at the end of the prosecution's closing argument.

While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.* When there is no contemporaneous objection, a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error. *Id.* Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). Prosecutorial misconduct rises to the level of fundamental error only if the acts or comments constituting the misconduct are so egregious or inflammatory that any ensuing prejudice could not have been remedied by a curative jury instruction. *Id.* The rationale of this rule is that even a timely objection to such inflammatory statements would not have cured the inherent prejudice. *Id.*

When the defendant did not object at trial, our inquiry is, thus, three-tiered. *See Field*, 144 Idaho at 571, 165 P.3d at 285. First, we determine factually if there was prosecutorial misconduct. If there was, we determine whether the misconduct rose to the level of fundamental error. Finally, if we conclude that it did, we then consider whether such misconduct prejudiced the defendant's right to a fair trial or whether it was harmless.

First we consider Brink's claim of prosecutorial misconduct regarding the showing of the videotape during opening statement. Opening statements serve to inform the jury of the issues of the case and briefly outline the evidence each litigant intends to introduce to support his or her allegations or defenses, as the case may be. *State v. Griffith*, 97 Idaho 52, 56, 539 P.2d 604, 608 (1975); *State v. Priest*, 128 Idaho 6, 13, 909 P.2d 624, 631 (Ct. App. 1995). While counsel should be allowed latitude in making an opening statement, generally, opening remarks should be confined to a brief summary of evidence counsel expects to introduce in his or her case-in-chief. *Griffith*, 97 Idaho at 56, 539 P.2d at 608; *Priest*, 128 Idaho at 13, 909 P.2d at 631. Counsel should not at that time attempt to impeach or otherwise argue the merits of evidence that the opposing side has or will present. *Griffith*, 97 Idaho at 56, 539 P.2d at 608; *Priest*, 128 Idaho at 13, 909 P.2d at 631.

We have already discussed the contents of the videotape and noted the absence of any contemporaneous objection to playing the videotape before it had been formally admitted. We have also noted the district court's pretrial rejection of Brink's objection to the videotape and have concluded that the contents of the videotape were relevant and that the probative value was not substantially outweighed by unfair prejudice. The parties dispute the amount of footage that was actually shown to the jury during the prosecutor's opening statement. We will assume *arguendo* that the entire videotape was played. Because the videotape was not admitted into evidence, it was available to the jury only during its presentation during the opening statement. No inflammatory comments were made during its presentation. The videotape allowed the jurors to view the crime scene as it was later encountered by police. It also placed into context the prosecution's subsequent trial evidence that Brink descended the stairs to the house, removed the shotgun from its hiding place, entered the room where the occupants sat, and intentionally shot the victim out of malice and not in self-defense. Given the district court's pretrial ruling on Brink's objection to the videotape, we conclude that this did not constitute prosecutorial misconduct.

Next we consider Brink's argument that the prosecutor committed misconduct by displaying the photographs of the crime scene, including the victim's body, through the course of the trial. As each disputed photograph was admitted, counsel for Brink renewed his objections presented in Brink's motion in limine--that the photographs were irrelevant and unduly prejudicial. Brink does not cite any authority supporting the proposition that a prosecutor commits misconduct by displaying evidence to the jury that the district court has already found to be relevant and not unduly prejudicial and which was, at some point during the trial, admitted into evidence. Brink asserts that the manner by which the photographs were displayed on the court's elevated monitor system, which projected them on a larger screen, was inflammatory. We do not agree that this procedure was somehow an incendiary tactic employed by the prosecutor. Additionally, Brink alleges that the jury was barraged by the gruesome photographs throughout trial. However, the photographs were used throughout trial to explain and illustrate testimony. We conclude that the prosecutor's use of relevant and admissible evidence through the course of trial did not constitute misconduct.

Finally, we consider Brink's argument that the prosecutor committed misconduct by displaying one of the photographs depicting the victim's body at the end of closing argument.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587. Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible. *Phillips*, 144 Idaho at 87, 156 P.3d at 588; *see also State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *Pecor*, 132 Idaho at 367, 972 P.2d at 745.

It is unclear from the record which photograph Brink complains was displayed to the jury. Brink asserts that it was the photograph depicting the victim's body slumped on the couch in a blood-soaked shirt and pants. For this analysis only, we will assume that Brink is correct. The photograph was found to be relevant and not unduly prejudicial. It was admitted into evidence and given to the jury for deliberations. It was also displayed to the jury on several occasions throughout the trial during testimony. We again conclude that it was not misconduct for the prosecutor to display the relevant, admissible photograph to the jury in closing argument.

D. Constitutional Arguments

Lastly, Brink argues that the district court's refusal to accept any additional pro se filings from him while he was represented by counsel violated his right to appear and defend in person and with counsel guaranteed by Article I, Section 13 of the Idaho Constitution. Brink also argues that this refusal to accept additional pro se filings violated his right of access to the courts. Additionally, Brink argues that the district court erred by failing to dismiss the criminal case as a remedy for the alleged violations regarding the terms and conditions of his confinement.

In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the United States Supreme Court clarified a defendant's right under the United States Constitution to represent himself in a criminal proceeding. In that case, the defendant repeatedly changed his mind regarding the role, if any, that counsel would have in his defense. The Supreme Court noted that a trial judge is not required to permit "hybrid" representation. *Id.* at 183. In other words, the defendant must elect to represent himself or to be represented by counsel. It is possible that a pro se defendant may be

appointed standby counsel, but that is not the condition in which Brink found himself in this case.

Realizing that the United States Supreme Court has not recognized a right of the type which he attempts to now assert, Brink argues that the Idaho Constitution is broader than the United States Constitution. However, Brink offers no Idaho authority for the proposition that Article I, Section 13 of the Idaho Constitution should be interpreted more broadly than the Sixth Amendment of the United States Constitution. To the contrary, Idaho courts have consistently declined to expand the scope of rights secured under Article I, Section 13 of the Idaho Constitution beyond those guaranteed by the Sixth Amendment of the United States Constitution in other respects. *See Aeschliman v. State*, 132 Idaho 397, 404, 973 P.2d 749, 756 (1999) (right to counsel in post-conviction applications); *State v. Gibson*, 110 Idaho 631, 635, 718 P.2d 283, 287 (1986) (declining to define a difference between federal and state Sixth Amendment guarantees); *State v. Bowman*, 129 Idaho 520, 524, 927 P.2d 910, 914 (Ct. App. 1996) (right to counsel in pre-accusatory proceedings); *State v. Burris*, 125 Idaho 289, 292-93, 896 P.2d 1384, 1387-88 (Ct. App. 1994) (right to counsel before submitting to an evidentiary test for intoxicating substances); *State v. Wavrick*, 123 Idaho 83, 87, 844 P.2d 71, 716 (Ct. App. 1992) (right to speedy trial); *LaBarge v. State*, 116 Idaho 936, 938-39, 782 P.2d 59, 61-62 (Ct. App. 1989) (applying federal Sixth Amendment analysis to claim of ineffective assistance of counsel). We are unpersuaded that a different result is warranted in this case. Furthermore, Brink was appointed counsel to provide him access to the courts. We conclude that Brink has not established a right under the Idaho Constitution to actively represent himself concurrent with his representation by appointed counsel. Therefore, the district court did not violate his right to access the courts in refusing to accept additional pro se filings while he was represented by counsel.

Finally, we consider Brink's argument that the district court erred by not dismissing the criminal complaint in light of his various alleged constitutional violations, including among other things, conditions of confinement, limitations of his freedom at the jail, and limited access to legal materials. Dismissal of a criminal complaint is an extreme sanction that must be justified by extreme circumstances. *See, e.g., State v. Fain*, 116 Idaho 82, 91, 774 P.2d 252, 261 (1989) (holding denial of defendant's motion to dismiss to be proper because dismissal is an extreme sanction that is not warranted in the face of strong evidence of guilt). In this case, Brink did not

file a motion to dismiss the criminal case for the alleged violations of his constitutional rights. Brink argues, in effect, that the district court abused its discretion by failing to sua sponte impose one of the most severe sanctions available to it as a remedy for Brink's perceived violations. The district court held that the proper recourse for Brink was an application for a writ of habeas corpus. Brink now argues that the course of proceedings proved that remedy to be inadequate. We conclude that the district court did not err by instructing Brink to file an application for a writ of habeas corpus and failing to sua sponte dismiss his criminal complaint even if Brink's attempts to file the application have later proven unsuccessful. Therefore, the district court did not abuse its discretion in failing to dismiss the criminal complaint against Brink as a remedy for the alleged violations of his rights.

III. CONCLUSION

The videotape and photographs of the crime scene, including images of the victim's body, were relevant and their probative value was not substantially outweighed by their prejudicial effect. The use of the videotape in opening statement, which was not later admitted into evidence, did not violate Brink's Sixth Amendment rights to confrontation, cross-examination, and assistance of counsel. The prosecutor's use of the relevant and admissible videotape and photographs of the crime scene, including images of the victim's body, in his opening statement and closing argument and throughout the course of trial was not intended to inflame the passions of the jury and did not constitute misconduct. The district court's refusal to accept additional pro se filings while Brink was actively represented by counsel, and its failure to dismiss the criminal complaint as a remedy for alleged constitutional deprivations in the conditions of his confinement, limitations of his freedom at the jail, and limited access to legal materials, did not violate any of Brink's constitutional rights. Therefore, Brink's judgment of conviction for first degree murder with an enhancement for using a deadly weapon as well as being a persistent violator is affirmed.

Chief Judge GUTIERREZ, **CONCURS.**

Judge LANSING, **CONCURS IN THE RESULT.**